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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. [redacted] 23

INTERSTATE COMMERCE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO, APPELLANTS,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY ET AL.

STATEMENT OPPOSING JURISDICTION.

HENRY W. CLARK,
JAMES M. SOUBY,
ROY F. SHIELDS,
ARTHUR C. SPENCER,
Solicitors for Appellee Oregon-Washington Railroad & Navigation Company.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 820

INTERSTATE COMMERCE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO, APPELLANTS,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

STATEMENT AGAINST JURISDICTION ASSERTED BY APPELLANTS.

This appellee, Oregon-Washington Railroad & Navigation Company, respectfully submits this statement

of matters and grounds making against the jurisdiction of this Court asserted by appellants.

Statement of the Record.

The petition in the court below was filed by this appellee against the United States of America as defendant to enjoin, set aside and annul an order of the Interstate Commerce Commission requiring appellee to build a railroad across central Oregon from, or near, a station on its line "designated as Crane, Oreg., to a connection with the Cascade line of the Southern Pacific Company at, or near Crescent Lake, Oreg." (Exhibit B to petition, R. 63.)*

The jurisdiction of that court in said proceeding was invoked under subdivisions 1, 8 and 28 of Section 41 and Sections 45 to 48, inclusive, of Chapter 2 of Title 28 of the Code of Laws of the United States of America (44 Statutes at Large, Part 1, pages 866 to 870, inclusive) as amended and supplemented by Supplement 3 of said Code of Laws of the United States of America, pages 291 and 292, now superseded by Supplement 5 of said Code of Laws of the United States of America, pages 458 and 459 (R. 10).

On the 30th day of June, 1930, the Attorney General of the United States, acting by and through his Assistants, and the United States Attorney for the District of Oregon appeared in said cause before said District Court and filed answer on behalf of the defendant United States of America to said petition (R. 122).

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*All references to the Record are to the typewritten Transcript of Record.

Thereafter the Interstate Commerce Commission, Public Service Commission of Oregon (now Public Utilities Commissioner of Oregon), and Public Utilities Commission of the State of Idaho, sole appellants herein, intervened in said court below and respectively filed answer in opposition to said petition (R. 109 and 100).

Said cause came on for trial before a statutory court of three judges on January 22, 1931, the petitioner appearing by its solicitors, the United States of America by its United States Attorney for the District of Oregon, and the said three intervening defendants by their respective solicitors (Statement of the Evidence, R. —) and said cause was tried before and submitted to said court on said date.

On January 29, 1931, said court rendered and caused to be entered in the cause its decree, wherein the relief prayed for by appellee in its said petition was granted against the defendant, United States of America, but no injunctive or other relief was granted against the said intervening defendants or any of them (R. 185).

The United States of America, the only defendant named in the petition, and the only party against which any relief was granted, has not appealed from said decree (R. 215). (Appellants' Statement of Jurisdiction, page 3.)

Grounds for Denying the Jurisdiction of this Court.

Appellee submits that the decree of the lower court has become final and binding as to the United States of America, the defendant in the case and the only

party against which any relief was granted, and that this Court does not have jurisdiction to review or set aside said decree on this appeal.

The petition in the court below named the United States of America as the sole defendant in accordance with Section 46, Title 28, of said Code of Laws of the United States of America (44 Statutes, Part 1, page 869) which provides:

> "Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the District Court *against the United States.*"

Under this statute the United States of America is a necessary party and the only proper party defendant in a suit of this character, for by that statute the United States has been designated as the party "to stand in judgment as representing the public". (*Illinois Central R. R. Co.* v. *Public Utilities Commission of Illinois,* 245 U. S. 493, 504, 505.)

Where a party has been thus designated to represent the public in litigation involving the public interest, and appeal is to be taken from a decree claimed to be adverse to such public interest, the party so selected to represent the public must join in such appeal in order to give this Court jurisdiction:

City of Chicago v. *Chicago Rapid Transit Co.,* 284 U. S. —, decided October 26, 1931, No. 25.

In this Chicago case the *per curiam* decision of the Court was as follows:

> "This suit was brought to restrain the Illinois Commerce Commission and the Attorney

General of the State of Illinois from enforcing an order of the commission prescribing rates of fare upon the appellee's railroads upon the ground that the order was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States. The city of Chicago was permitted to intervene as defendant. The District Court, composed of three judges (U. S. C. title 28, § 380; 28 U. S. C. A. § 380), granted an interlocutory injunction, and on final hearing entered its decree, adjudging, upon findings, that the rates prescribed by the state commission were confiscatory and permanently restraining the enforcement of its order. The Illinois Commerce Commission and the Attorney General of the State have not appealed from the decree, which is thus a final adjudication of the invalidity of the rate order. The present appeal is taken by the city of Chicago.

"The Court is of the opinion that the city of Chicago has no separate standing which entitles it to appeal from the decree, and its appeal is dismissed." (Citing cases.)

This decision is controlling unless the statutes governing this particular class of proceedings give the right of appeal to appellants merely because they were interveners in the court below, though not directly interested in or affected by the decree rendered. We find nothing in those statutes which makes such intervener *an aggrieved party* having the right of appeal. The pertinent sections of the statutes are set forth for convenient reference as an appendix to this statement.

Section 47*a* (see appendix) authorizes an appeal by *"an aggrieved party"*. An aggrieved party is one having a direct and substantial interest in the controversy. (2 Ruling Case Law, page 52, Sec. 34; *Hamilton Trust Co.* v. *Cornucopia Co.* (C. C. A. 9th), 223 Fed. 494, 499 (*certiorari* denied 239 U. S. 641); *Easton Transit Company's Petition,* 270 Pennsylvania 136, 112 Atlantic 917.) In this case the only party having such direct and substantial interest adverse to the railroad is the public.

The essence of the Interstate Commerce Commission's order under attack is summarized in its finding that the construction of the proposed line "is reasonably required in the interest of *public* convenience and necessity." (Exhibit B to Petition, R. 63.) This finding was made pursuant to the statutory mandate that no such order could be made unless the commission should find that the proposed construction "is reasonably required in the interest of *public* convenience and necessity." (Interstate Commerce Act, Section 1, subdivision 21, 41 Stat. 478.)

Essentially the nature of this controversy is such as to arraign on one side the public, and on the other side the interested carriers, with no strictly private interests involved. In this respect the present case is not like those in which the Interstate Commerce Commission itself is directly affected by the enforcement or setting aside of its order, such, for instance, as one requiring the carriers to file reports or follow prescribed forms of accounting; nor is the case like those in which the order affects directly the interests of

particular shippers, such as orders fixing rates or removing discriminations. In the present case, neither the Interstate Commerce Commission itself, nor the rights or interests of any individual, are affected by the decree of the lower court.

If appellants were to be limited to Section 47*a* for authority to prosecute this appeal, they would be in no better position than was the City of Chicago in the *Chicago Rapid Transit Company* case above quoted. There, as here, the City of Chicago, which had intervened in the court below, assumed to represent the public; but there, as here, the province and duty of representing the public interest had been committed to another party although others were permitted to intervene in the public interest and be heard in the court below. There, as here, the intervener though given the right to be heard was not an *"aggrieved party"* to the decree rendered. We think it clear that authority to prosecute this appeal is not found either in Section 47*a* or in the general statute governing appeals from decrees in equity which was construed in *City of Chicago* v. *Chicago Rapid Transit Company, supra.*

It may be that appellants rely upon Section 45*a* (see appendix) which authorizes intervention by the Interstate Commerce Commission and also by other parties "who are interested in the controversy or question before the Interstate Commerce Commission", and provides that—

> "the Attorney General shall not dispose of or discontinue said suit or proceeding over the

> objection of such party or intervener aforesaid, but said intervener or interveners may *prosecute,* defend, or *continue* said suit or proceeding unaffected by the action or nonaction of the Attorney General therein."

We think this section does not authorize the present appeal for the reasons:

First. To "prosecute" or "continue" a suit to decree is one thing; to appeal from such decree is another. The right to do one does not necessarily include the right to do the other. Thus, due process of law requires that a party have one hearing before one court, but does not necessarily include the right of appeal from the judgment or decree of that court. While the quoted provision of Section 45*a* should be given the full intended effect, a reasonable construction of it is consistent with the thought that interveners, whose interest is indirect and on behalf of the public, are fully recognized if such interveners are privileged to carry the suit or proceeding to a final decree before the three-judge court specially provided to hear and determine such cases.

Second. Section 45*a* authorizes the intervention in the lower court of "communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission," and we cannot conceive that Congress intended to grant to each and all of these various and numerous classes of interveners, however remote or indirect their interests may be, the right to prosecute an appeal to this court.

If a party may take an appeal at all, he may take it as of right. Cases before this Court reflect the common knowledge that in many cases heard by the Interstate Commerce Commission interveners in large numbers become parties to the record and participate in the hearing. Such was the situation in the hearing before the Interstate Commerce Commission in the proceding now in question. The municipalities and commercial organizations thus intervening were so numerous that they were referred to collectively in the report of the Commission as "various Oregon municipalities and commercial organizations." (Exhibit B to the Petition, R. 63.) By said Section 45*a* each and all of said interveners before the Commission were entitled to intervene in this suit before the lower court, and having thus intervened, any one of them would be entitled as a matter of right to "*continue*" said suit or proceeding to this court if the word "continue" is to be construed as synonymous with the word "appeal." In short, any party permitted to intervene before the Commission could force his way to a hearing before this Court regardless of the lack of merit in his appeal and notwithstanding the absence of substantial or direct interest in the subject matter of the controversy. If this interpretation of Section 45*a* is correct, the volume of probable appeals to this Court will become proportionate to the liberality of the Commission in permitting interventions in proceedings before it. We cannot conceive that such unrestrained appropriation of the time and jurisdiction of this Court was contemplated in the enactment of Section 45*a* by Congress, which in recent years has by appropriate

legislation shown its appreciation of the excessive demands upon the time of this Court.

Third. Section 45*a* relates not only to procedings to *set aside* an order of the Interstate Commerce Commission in which the United States is a party defendant, but also to procedings to *enforce* an order of the Interstate Commerce Commission in which the United States is the party plaintiff. It is not unreasonable to assume that the parts of that section which authorize an intervener to "prosecute" or "continue" a suit or a proceeding had reference to those cases in which the United States was the plaintiff and did not apply to the prosecution or continuance *after decree* of a suit in which the United States was the defendant. This interpretation would give full and reasonable effect to language employed. The authority to "prosecute" or "continue" a suit implies that the party thus proceeding is the moving party or plaintiff in the case and who would be affected adversely if the proceedings were discontinued or disposed of without going to decree, and the provision of the section in question authorizing the intervener to "defend" likewise implies an interest of such intervener in such defense, but certainly the right of defense thus granted standing alone would imply no right of appeal from a decree rendered after such defense had been made.

The cases cited by appellants (their Statement, page 3) to sustain the jurisdiction asserted by them are in harmony with the views we present. In the first three cases so cited, the United States was a party to the appeal and was represented in this Court by the

Attorney General or the Solicitor General. In the fourth or last case cited by appellants, the case was tried and the appeal taken before the enactment of Section 46 (see appendix) requiring the United States to be named as the party defendant in proceedings to set aside an order of the Interstate Commerce Commission, and before the enactment of said Section 47*a* which provides that "the Attorney General shall have charge and control of the interests of the government" in cases of this character "in the district courts, and *in the Supreme Court of the United States* upon appeal from the district courts."

To recognize the interveners as proper appellants herein is to substitute them for the United States "to stand in judgment as representing the public" and to substitute their solicitors for the Attorney General to assume "charge and control of the interests of the Government."

Respectfully submitted,

HENRY W. CLARK,
JAMES M. SOUBY,
ROY F. SHIELDS,
ARTHUR C. SPENCER,
Solicitors for Oregon-Washington Railroad & Navigation Company.

Dated at Portland, Oregon, May 2, 1932.

NOTE.—References to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

APPENDIX.

Section 45*a*, Title 28, Sup. V, U. S. C.
Section 46, Title 28, U. S. C.
Section 47*a*, Title 28, Sup. V, U. S. C.

45*a*. (*Judicial Code, sections* 212, 213, *amended.*)

Special attorneys; participation by Interstate Commerce Commission; intervention.—The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action; Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all

matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the court by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. (June 18, 1910, c. 309, § 5, 36 Stat. 543; Mar. 3, 1911, c. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, c. 32, 38 Stat. 220.)

46. (*Judicial Code, section* 208). *Suits to enjoin orders of Interstate Commerce Commission to be against United States.*—Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and de-

termination of the suit. (June 18, 1910, c. 309 § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149.)

47*a*. (*Judicial Code, section* 210.) *Appeal to Supreme Court from final decree; time for taking; priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)